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March 17, 2004

Chairman Michael Powell
Federal Communications Commission
445 12th Street, SW, Ste 8-B201
Washington, DC 20554

Dear Chairman Powell,

We understand that industry representatives have requested that the tribal provisions be removed from the draft Nationwide Programmatic Agreement (PA) and that they have raised noisy objections to the voluntary Best Practices agreement that has been the source of extensive FCC and USET discussions over the past year.

After making a tremendous effort to provide comments and to consult with the FCC, USET objects strongly to the notion that the Programmatic Agreement should now go forward without tribal provisions. Why should our matters be dismissed after so much work, to be resolved at some uncertain date in the future, if at all? Tribal sites are just as important as other sites. Evaluation of those sites and tribal consultation are just as mandatory as other requirements in the National Historic Preservation Act. USET would be deeply troubled by a sudden decision to leave tribes out of the PA.

The voluntary Best Practices that USET has been developing with the FCC is an effort to draft a set of guidelines that would help both applicants and tribes to achieve their goals in a timely fashion. USET was quite disappointed that, after agreeing with FCC staff that industry should be given a copy of the draft Best Practices for its review and comment, that industry, rather than taking the opportunity to come forward with meaningful and positive suggestions, has chosen to distribute an exaggerated and provocative position paper opposing the Best Practices in their entirety. To this date, industry has not bothered to raise its concerns directly with USET or to accept USET's offer to sit down and try to develop common ground. I have attached a document that analyzes

industry's paper and, on a point-by-point basis, clarifies its mischaracterizations.

The starting point for all discussions regarding the National Historic Preservation Act and Tribes should be the two separate requirements found in that act: first, the obligation of a Federal agency to evaluate its undertakings for their impact on tribal historic properties (16 U.S.C. 470f; 16 U.S.C. 470(a)(d)(6)(A)); and, second, the obligation of a Federal agency to consult with tribal governments to seek official tribal views on that undertaking and its impact (16 U.S.C. 470(a)(d)(6)(B)). These are distinct obligations. With regard to the first obligation, the agency (in this case, the FCC) is responsible for an extensive review process outlined in the Section 106 regulations (36 CFR Part 800). The PA and the Best Practices are an effort to provide an alternative to those regulations that would expedite review. For the last ten years, the FCC has generally ignored its obligation under those regulations and is in a legally vulnerable position. It should be noted that Part 800 includes acknowledgement of tribal "special expertise" as described more fully below.

With regard to the second obligation, consulting with tribal governments to seek their formal views is distinct from securing tribal expertise regarding the assessment of an undertaking. Tribal governments do not seek compensation for providing these formal views which are at the heart of the government-to-government relationship between the United States and federally recognized tribes.

The FCC's Unique Trust Responsibility to Tribes. All of these comments must be considered in light of the FCC's legally binding trust obligation to tribes. The FCC has no similar obligation to the applicants. The nature of the trust responsibility is set forth in great detail in many places, but it is sufficient to point to the FCC's own policy statement to understand the significance of this legal doctrine. (See "Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes", adopted June 8, 2000.)

Addressing Industry's Fears – "Too Many Tribes; Too Much Money". While industry has not offered any proposals to address tribal concerns regarding the literally thousands of cell towers that have been or are being constructed without proper review for their impact on tribal historic properties, USET has proposed and supported innovative solutions to industry's two principal concerns: (1) that industry has to worry about

contacting up to 562 federally recognized tribes and (2) that tribes, if compensated for providing their professional expertise for the assessment of a site, would hold industry hostage for excessive and unreasonable fees.

With regard to the first fear, it should be noted that 40% of the tribes on the federally recognized list are Alaska native villages where there are few, if any, issues regarding the placement of a tower. As for the remaining 60%, USET has committed to participating in and promoting the FCC's Tower Construction Notification System (TCNS), which will provide certainty to industry and the FCC about which tribes are interested in what areas. Typically, that number will be in the single digits, and often only one or two. Already, in a month's time, 40 tribes have entered data into that system, representing nearly 20% of the tribes in the lower 48 states. Moreover, it is not that difficult to supplement the TCNS by contacting the Bureau of Indian Affairs to identify non-participating tribes that would be interested in a certain area. It will also only take industry a few weeks of working in an area to learn which tribes are or should be involved.

With regard to the second fear, USET constantly asks, without any answer, why industry should be able to tap tribal expertise and not have to pay for it. Nonetheless, to address industry's fear, USET has committed to developing a simple, generally flat-fee cost-based model schedule that would only seek to recover tribal costs in providing tribal expertise to industry. The Advisory Council on Historic Preservation has specifically found that payment to tribes is appropriate when an Agency or Applicant "essentially asks the tribe to fulfill the role of a consultant or contractor" as when it "seeks to identify historic properties that may be significant to an Indian tribe, [and] ask[s] for specific information and documentation regarding the location, nature and condition of individual sites, or actually request[s] that a survey be conducted by the tribe."[1] The Advisory Council regulations state that the "agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them." (§ 800.4(c)(1)). From a tribal perspective, this special expertise is absolutely essential to the evaluation of tribal historic sites, as we have seen non-tribal "experts", especially the

[1] See John Fowler, *Fees in the Section 106 Review Process*, Executive Director Memorandum, Advisory Council on Historic Preservation at 3 (July 6, 2001).

"hired guns" of industry, consistently misinterpret and even ignore obvious tribal sites.

Tribes, which typically can only afford one person to work on all historic preservation issues, are not in a position to provide pro-bono work to the telecommunications industry. The industry constantly asserts that 90% or more of the time, tribes do not respond to industry letters, so why put in place a procedure that might increase tribal participation? These letters, which literally pore into tribal offices by the hundreds, are either seeking to engage in government-to-government consultation or to secure tribal expertise. USET tribes do not respond to letters for government-to-government consultation from private entities. We, like all tribes, jealously guard the government-to-government relationship and will not accept its diminishment by delegation. Where the industry letters are seeking tribal expertise, they never offer to pay for that expertise, even though every other expert involved in the construction of a tower is compensated, including the subcontractors who are actually sending the letters. The telecommunications industry is engaged in a for-profit enterprise. The cost of assessing tower sites for their impact on tribal religious and cultural properties is a cost of business for that industry. Tribes should not have to bear any portion of that cost.

I hope that these comments are helpful and relevant to your concerns. Please do not hesitate to contact me or USET's representatives in Washington (Gregory Smith and Eric Tober at 202-659-8400) if you have any questions or require any further information.

Sincerely,

James T. Martin
Executive Director

USET ANALYSIS OF TELECOMMUNICATIONS INDUSTRY ATTACK ON THE BEST PRACTICES AGREEMENT AND TRIBAL PROVISIONS IN THE NATIONWIDE PROGRAMATIC AGREEMENT

Set forth below is the text (without all the underlining) of the March 10, 2004 briefing paper distributed by the Counsel to the Wireless Coalition to Reform Section 106, with USET's commentary in **bold** after each section.

- "Many in industry are concerned that the draft Best Practices Agreement ("BPA") suggests that the tribal provisions of the Programmatic Agreement ("NPA") could significantly increase the complexity, delay and expense of complying with Section 106, over what the law now requires."

Current law requires a lot. The Section 106 regulations are detailed, complex and do not have significant time lines. The process may appear easier to industry because over the last ten years *the FCC has ignored its statutory and regulatory obligations under current law, resulting in the licensing of many towers without proper review.* If the PA does not address tribal issues, and the Best Practices are not adopted, USET and tribes around the country will have no alternative but to demand that the FCC finally comply with the law. As the PA is intended to expedite implementation of the law, full FCC compliance with the law as it stands today will likely result in greater delay and more complexity than will be the case under the PA and the Best Practices. Notably, on those few occasions where the FCC has fully complied, the process has not been speedy.

- "The BPA was developed by the FCC and United South and Eastern Tribes ("USET"), with no meaningful opportunity for input from industry, until this week."

This is a bizarre statement since the Best Practices are in draft form, are fully subject to whatever is finally put in the PA, and the FCC and USET have shared it with industry in order to secure industry's comments. For its part, USET is fully open to working with industry to identify Best Practices that will work for all parties. We have said as much to industry, but have yet to have industry accept our offer to work with them. As an historical note, USET opened the Best Practices discussions with the FCC by sharing a draft document USET had developed at great expense with the Personal Communications Industry Association (PCIA). Although PCIA never adopted the final version of that document, PCIA played a great part in its development and, therefore, had substantial input into USET's starting point with the FCC.

- "The procedures and time frames in the nominally voluntary BPA, must naturally be consistent with mandatory procedures in the NPA, and even voluntary BPA procedures that are FCC-endorsed will inevitably become de facto minimum standards."

Since the Best Practices document very clearly states that it is voluntary and, just as significantly, prominently emphasizes that applicants and tribes are free to adopt their own procedures, industry's concern that the Best Practices will be some sort of strait jacket are over blown. The goal of the Best Practices is to get industry and tribes talking and reaching resolution on tower sites that, once put in writing, will free the FCC from carrying out far more extensive consultation under the Programmatic Agreement or the Section 106 regulations.

"Eight Problematic Procedures Disclosed by the March 5 Draft of the BPA"

1. "They extend time frames for review in every case of no tribal response from 30 days, to a minimum of 88 days (three months), and perhaps much longer (nine months or more)."

Aside from the fact that this is a wild miscalculation of the time frames by industry, the time frames in the Best Practices are consistent with time frames provided in many federal laws and regulations and are shorter than what would result if the current Section 106 regulation were fully followed by the FCC. They do not preclude the industry from conducting other activities at the same time, such as working with the SHPO, participating in the local zoning process, environmental reviews, etc. Since participating tribes will have agreed to the Best Practices, it is rare that you would even see the time frames fully utilized but, in such a case, the result will still be certainty for industry within a reasonable time. The alternative under current law of full FCC consultation with a tribe is completely open-ended in terms of time frames and is of less use to industry than what the Best Practices provides.

2. "Where tribes do not respond, they require five redundant contacts to initiate consultation, and six mandatory waiting periods that the FCC cannot shorten or waive."

Industry does not appear to be reading the same document that USET has worked on. In the Best Practices, when a tribe does not respond within ten days to an initial contact from an applicant, the applicant only has to make one additional effort to contact the tribe. If there is no response within 10 business days, the applicant turns the issue over to the FCC to begin the government-to-government consultation process. However, this is going to be rare. Tribes that have agreed to the Best Practices understand that time is of the essence for industry and that if they fail to respond in a timely manner, they will lose their right to object to a tower siting. The provisions in the Best Practices that discuss tribal failure to respond are there to address industry fears that tribes will hold up projects by not responding. They are not there to give tribes a vehicle for holding up projects.

3. "They provide a schedule for payment of fees to tribes by applicants (not by the FCC) and selectively quote the ACHP to justify an improper fee standard."

The Best Practices requires USET to develop a sample schedule intended to recover tribal costs for providing expertise to applicants. It does not require the FCC to endorse this schedule, nor does it require any particular applicant or tribe to adopt it. The cost recovery under the schedule is solely for providing tribal expertise as consultants to industry, not for providing formal tribal views to the FCC pursuant to government-to-government consultation. USET understands that industry fears that tribes will use the Best Practices process to establish a profit center. As it is vitally important that this whole process work if tribes are to assure the protection of their historic and sacred sites, USET considers an unreasonable schedule to be as adverse to tribal interests as it would be to industry interests.

It should be noted that industry is engaged in a for-profit undertaking. They will recover their expenses, which include compliance with Section 106. Tribes should not have to carry the burden of doing what is, in fact, a cost of business to industry.

4. "They unnecessarily require for every site, unless expressly waived by a tribe, a full detailed site survey for above ground properties, using qualified professional historians, and extending the APE to the extend of what can be seen (view shed)."

Again, industry is either reading a completely different document or completely misreading the same document USET is working on. First of all, most sites, for most tribes, will not require any review at all. Only sites where a tribe identifies that it has a specific interest will require a review. At that point, a survey is recommended by the Best Practices. The recommended survey is fairly thorough, but actually is a compromise on what could be an even more detailed survey. It is intended to provide the basic information necessary and to obviate the need, in most cases, for tribal historic officers to visit the tower site. The ACHP regulations require agency officials to make a reasonable and good faith effort to carry out appropriate identification and specifically refer to a field survey, among other things, as one way to do this (consistent with the Secretary of Interior's standards and guidelines for identification for guidance on this subject). 36 CFR 800.4(b)(1). USET is open to discussing when a field survey would not be necessary in a site otherwise identified by a tribe as being of interest. As for the view shed issue, USET has repeatedly agreed, and even told industry, that the Best Practices cannot conflict with the PA and, therefore, it will be bound by the definition of "view shed" in the PA.

5. "They require for every new site, unless waived, a full archeological site survey and shovel test, using qualified archeologists with local knowledge and experience."

This is the same survey referred to in point 4 and the response is the same. The survey would only be necessary where a tribe has said it has a specific interest in a

site and is only as detailed as is necessary to determine whether tribal historic properties would be affected.

6. "They give tribes the right to determine adverse effects and SHPO-like power to execute a previously unknown document called an MOU, before effects can be resolved."

This statement, unfortunately, is pure fabrication. If a tribe thinks there is an adverse effect, and the applicant disagrees, the issue goes to the FCC. The Tribe cannot unilaterally declare an adverse effect. As for the MOU, that is merely the document memorializing the agreement between the applicant and a tribe regarding how a site should be dealt with. It is intended to protect the applicant's interest before the FCC when the applicant moves forward with development of the tower by locking in the tribe's position on that site. Different forms of MOU's are widely used to memorialize the understanding of different parties in this area.

7. They give tribes previously unknown power to reverse their positions.

The Best Practices do not provide any new powers or rights not already provided for in Section 106. Once agreement has been reached tribes can only alter their views under the terms of the Best Practices if there has been an "inadvertent find." In other words, something important has been discovered on the property that was not found during previous review that requires reconsideration by all the parties. If a tribe states that a tower has no impact, and then while under construction a tribal burial ground is found, the tribe should have the right to change its position!

8 They provide an unnecessarily overbroad scope of confidentiality (all information from the tribe or about tribal properties is confidential).

The confidentiality provision in the Best Practices is intended to protect both the applicant and the tribe. USET has been told by industry that it wants strong confidentiality provisions to protect the secrecy of sites companies have under consideration for a tower. Equally, Tribes want confidentiality on tribal historic and sacred sites. Tribes know that when a tribal cultural site becomes public, it is immediately the target of professional looters who sell tribal artifacts and remains into a large black market. This is a huge problem for tribes.

"Conclusion

"Because of the above described problems among others, the Wireless Coalition to Reform Section 106 and other industry members strongly suggests that Section IV of the NPA be removed from the NPA, that the Commission develop a refined Section IV and revise the BPA in consultation with industry and other stakeholders, and that in the interim, tribal participation be governed by current law."

USET strongly opposes striking Section IV. USET would like to emphasize that if current law were (finally) to be complied with in the absence of the PA and Best Practices, the process of reviewing sites for tribes under Section 106 would be long and onerous for the FCC. We strongly urge that the FCC review the extensive regulations at 36 CFR Part 800. We would like to note here that just for Section 800.4, agency officials are obligated to:

1. Determine and document the area of potential effects;
2. Review existing information on historic properties within the APE, including any data concerning historic properties not yet identified;
3. Seek information from consulting parties and other individuals and organizations, likely to have knowledge of or concerns with historic issues relating to the undertaking's effects;
4. Gather information from any Indian tribe or Native Hawaiian organization to assist in identifying properties [NOTE THAT THIS IS NOT THE GOVERNMENT-TO-GOVERNMENT CONSULTATION REQUIREMENT, WHICH IS SEPARATE];
5. Identify historic properties;
6. Make a reasonable and good faith effort to carry out appropriate identification, which may include background research, consultation, oral history, field investigation and field survey.
7. Take into account past planning, research and studies;
8. Consider alternatives;
9. Apply National Register criteria (recognizing the "special expertise" of tribes);
10. Determine property eligibility.

Again, these requirements are just from Section 800.4.